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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Undetermined quantities of various articles of drug . . . EQUIDANTIN . . .,

PERFORMANCE PRODUCTS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Eighth Circuit's decision in this case conflict with the decision of the Fifth Circuit in *United States* v. *Generix Drug Corp.*, 654 F. 2d 1114 (5th Cir.), *cert. granted*, 102 S. Ct. 1610 (1982), and improperly construe the applicable statutory provisions?

2. Should "new animal drug" in 21 U.S.C. § 321(w) (1976) be defined according to the analysis of the Fifth Circuit in *United States* v. *Generix Drug Corp.*, 654 F. 2d 1114 (5th Cir.), *cert. granted*, 102 S. Ct. 1610 (1982), defining "new drug" in 21 U.S.C. § 321(p) (1976), or according to the conflicting analysis of the Second Circuit in *Premo Pharmaceutical Laboratories, Inc.* v. *United States*, 629 F. 2d 795 (2d Cir. 1980)?

3. Was it reversible error for the Eighth Circuit to affirm the district court's judgment that the seized article of drug was a "new animal drug," according to 21 U.S.C. § 321(w) (1976), in light of the Fifth Circuit's decision in *United States* v. *Generix Drug Corp.*, 654 F. 2d 1114 (5th Cir.), *cert. granted*, 102 S. Ct. 1610 (1982)?

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The petitioner, Performance Products, Inc[1]., respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered April 15, 1982.

1. Performance Products, Inc. is an independent corporation without a parent corporation or subsidiaries.

OPINIONS BELOW

The opinion of the court of appeals, not yet published, appears in Appendix A at pages 1-17 [hereinafter Appendices will be cited in parentheses as A or B with page numbers]. The judgment, findings of fact, and conclusions of law of the district court is reported at [New Matters] FOOD DRUG COSM. L. REP. (CCH) ¶38,120 (E.D. Mo. May 29, 1981) (A18-24).

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1982. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED*

21 U.S.C. § 321(p) (1976)
21 U.S.C. § 321(w) (1976)

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* The texts of both statutes appear in Appendix B.

STATEMENT OF THE CASE

This petition, filed by Performance Products, Inc. [hereinafter Performance] is based upon a seizure action brought by the United States of America under the Federal Food, Drug, and Cosmetic Act [hereinafter the Act], 21 U.S.C. § 301 *et seq.* (1976), against the article of drug Equidantin, a brand of nitrofurantoin oral suspension. The subject matter jurisdiction of the District Court was premised upon 21 U.S.C. § 334 (1976) and 28 U.S.C. § 1345 (1976).

Performance has manufactured Equidantin brand of nitrofurantoin oral suspension since 1970. It is intended for use in the treatment of equine tracheopharyngitis ("race track cough") and bacterial urinary tract infections. The active ingredient in Equidantin is nitrofurantoin, which is also the active ingredient in a drug approved by the Food and Drug Administration [hereinafter FDA], Dantafur. Equidantin and Dantafur both contain the same amount of nitrofurantoin per dosage unit, and the inactive ingredients in the two drugs are different.

A complaint for forfeiture was filed on July 25, 1979 against the defendant article of drug. The United States alleged that the seized articles were adulterated, according to 21 U.S.C. § 351 (a)(5) (1976), because they were "new animal drugs," according to 21 U.S.C. § 321(w) (1976), for which there was no approved "new animal drug" application in effect. Performance maintained that the articles were not "new animal drugs" because the product was generally recognized as safe and effective for its intended uses. Performance also maintained that the Government had failed to establish by a preponderance of the evidence that the seized articles were adulterated.

The seizure action was tried without a jury, and on May 29, 1981 the district court ruled that the seized articles

were "new animal drugs" for which no approval was in effect and, therefore, were adulterated. The articles were condemned and forfeited by an order dated July 2, 1981, which was stayed pending appeal. Performance appealed the judgment on July 28, 1981 to the Court of Appeals for the Eighth Circuit.

On appeal, Performance asserted that nitrofurantoin oral suspension at the dosage levels and for the indications prescribed and recommended in the labeling for Equidantin was not a "new animal drug." The bases of its assertion were that Equidantin's active ingredient, nitrofurantoin, was generally recognized as safe and effective for its prescribed uses, and that the United States had failed to prove by a preponderance of the evidence that it was a "new animal drug." Performance also contended that the Fifth Circuit's decision in *United States* v. *Generix Drug Corp.*, 654 F. 2d 1114 (5th Cir.), *cert. granted*, 102 S. Ct. 1610 (1982), was correct and supported its position that the term "new animal drug" applies only to a drug's active ingredients and that the Second Circuit's conflicting analysis in *Premo Pharmaceutical Laboratories, Inc.* v. *United States*, 629 F. 2d 795 (2d Cir. 1980), was unsupported by the language of the statute or its legislative history.

In affirming the district court, the Eighth Circuit held that the testimony of the experts proffered by the Government established that Equidantin was not generally recognized as safe and effective. However, the testimony of the Government's experts relied, to a significant extent, on the lack of bioavailability studies for the seized drug. The court of appeals held that, even under the *Generix* test in which the active ingredient is determinative of "new drug" status, nitrofurantoin was not generally recognized as safe and effective. Therefore, the court of appeals con-

cluded that it was not required to reach the issue of whether *Generix* or *Premo* was the correct standard for defining "new animal drug" status for the seized articles.

Performance asserted at oral argument that the issue of bioavailability being an attribute of a "new animal drug" so pervaded the proceeding and testimony in the district court that the issue must be addressed as part of the ultimate resolution of the case, and it asserts this point in support of its petition.

REASONS FOR GRANTING THE WRIT

Petitioner in the instant case raises issues of law which are presently before this Court in *United States* v. *Generix Drug Corp.*, 654 F. 2d 1114 (5th Cir.), *cert. granted*, 102 S. Ct. 1610 (1982). The principal issue in the instant proceeding is whether the article seized is a "new animal drug" within the meaning of 21 U.S.C. § 321(w) (1976) (B2). This determination requires an interpretation of the definition of "new animal drug" in conjunction with the interpretation of the definition of "new drug" found in 21 U.S.C. § 321(p) (1976) (B1), which is the subject of conflicting interpretations by the Fifth Circuit in *Generix* and the Second Circuit in *Premo Pharmaceutical Laboratories, Inc.* v. *United States*, 629 F. 2d 795 (2d Cir. 1980)[2].

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2. Both *Generix* and *Premo* concern the definition of a "new drug" contained in 21 U.S.C. § 321(p) (1976), which applies to human drugs. The statutory definition relevant to this proceeding, for "new animal drugs," is 21 U.S.C. § 321(w) (1976). The applicable language of each is virtually identical and, in fact, prior to 1968, the year when § 321(w) was added to the statute, animal drugs and human drugs were all subject to the definition set forth in § 321(p). Additionally, the other relevant statutory provisions applicable to new human and animal drugs are virtually identical.

Although the Eighth Circuit in its decision expressly stated that it was not required to address the issues upon which the Second and Fifth Circuits disagreed, its ruling implicitly adopted the *Premo* rationale that bioavailability is an attribute of a "new animal drug" by its acceptance of and reliance upon the expert testimony presented by the Government. Furthermore, the relevance of bioavailability to "new animal drug" status was a key issue raised by Performance at trial.

Bioavailability is the study of the rate and extent of drug absorption (A3). Testimony on bioavailability had a decisive impact on this proceeding. The importance of and reliance placed upon the issue of bioavailability is manifested by the fact that the two Government witnesses testifying on the effectiveness and safety of nitrofurantoin suspensions both relied upon the absence of bioavailability data to support in their opinions. Also, the third witness, Dr. Meyer, did not testify to the safety and efficacy of the seized product; rather, his testimony was completely addressed to the matter of bioavailability (A14-15). Performance objected to all testimony relating to bioavailability. The district court overruled Performance's objections, admitted the testimony, and relied on it, in part, as a basis for its decision (A3-4, A14-15).

The relevancy of bioavailability to "new drug" status has been directly addressed by two courts of appeal and in the dicta of a third. In *Generix*, 654 F. 2d at 1119-20, the Fifth Circuit stated:

> It may well be good public policy to regulate the bioavailability and bioequivalence through the NDA or some equivalent process. However, we have found that the statutory language and history of the Food, Drug and Cosmetic Act does not require such approval. The judicial branch may not legislate to fill perceived voids in public policy.

The Second Circuit in *Premo*, 629 F. 2d at 805, adopted a different analysis of the importance of bioavailability, stating:

> On the other hand, later developed "me-too" products such as Insulase are required to apply for FDA approval for the undisputed reason that a difference in inactive ingredients, as exists here, when combined with the active ingredient, can affect the safety and effectiveness of the drug product (footnote omitted).

In *United States* v. *Articles of Drug* (*Lannett*), 585 F. 2d 575, 582 (3d Cir. 1978), the Third Circuit addressed the issue of bioavailability in dicta, stating:

> . . . bioavailability, bioequivalence, and other quality control tests are irrelevant as to safety and efficacy.

Performance asserted in its appeal that the correct interpretation of the statute, was the one adopted by the Fifth Circuit because it is supported by the legislative history and statutory language. Further, this was the basis for the objections to the introduction and consideration of bioavailability testimony upon the ground that it is not an attribute of a "new animal drug." The Eighth Circuit did not expressly discuss Performance's challenge to the admission of bioavailability testimony. However, it did indicate that the testimony at trial supported the district court's finding that the seized article of drug was not generally recognized as safe and effective, and it described the testimony of the Government's witnesses, including a reference to testimony on bioavailability (A14-15).

The fact that bioavailability was an important issue in the proceeding, one inextricably involved in the final determination of "new animal drug" status, is manifest in the court of appeals' decision. The issue of bioavailability as an attribute of a new drug pervades the proceedings below and is one on which the circuits disagree. The

relevance of bioavailability to "new drug" and "new animal drug" status is an important matter and one which has a significant bearing on the marketing of drugs under the Act. Therefore, its resolution will have far-reaching consequences and is deserving of this Court's review.

Petitioner submits that this issue is one which will be addressed by the parties in *Generix* and that the present case should be heard and ruled upon concurrently.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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